Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 80-106

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SAICI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

The Government asserted an estate tax against the estate of Adriana Bosurgi, mother of Leone and Emilio Bosurgi, who died in 1963. The fund in suit (approximately $400,000) which the Government is seizing under the default here directed against SAICI, came into being under a judgment in favor of SAICI secured in the New York Supreme Court in 1973 in a common law fraud and conversion action against the Chemical Bank to which neither the Government nor the estate of Adriana Bosurgi were parties. Nor was the custodian account in the name of Adriana Bosurgi from which the Government's estate tax claim allegedly arose, involved in the State Court litigation.

1. Did the Court of Appeals err,

contrary to the holding of the Court in Commissioner v. Bosch, 387 US 456 (1967), when it failed to give "proper regard" to the State Court judgment under which SAICI was entitled to the fund in question?

2. Did the Court of Appeals err, contrary to the full faith and credit clause of the Constitution, when it failed to give respect to the State Court judgment under which SAICI was entitled to the fund in question?

3. Did the Court of Appeals err, contrary to the due process clause, when it deprived SAICI of a trial or hearing in the District Court to establish the validity and the force and effect of its State Court judgment?

4. Did the Court of Appeals err, contrary to the full faith and credit

clause of the Constitution, the due process clause, and the opinion of this Court in Commissioner v. Bosch, 387 US 456 (1967), when it permitted the District Court to strike the answer of SAICI, which answer asserted SAICI's reliance upon the State Court judgment holding it entitled to the fund in question, and enter a default against SAICI in favor of the Government solely because of SAICI's inability to comply with every discovery demand of the Government in its tax foreclosure action as against the fund in question, with respect to taxes owed by another?

5. Did the Court of Appeals err, contrary to the holdings of this court in Blonder-Tongue v. University Foundation, 402 U.S. 313 (1971) and Parklane Hosiery Company v. Shore, 439 U.S. 322

(1979) when it failed to apply the doctrine of non-mutual collateral estoppel against the Government, after the Government participated informally and effectively in the State Court proceedings, against the position advanced by SAICI, but declined the invitation of the State Courts to participate as amicus, and refused to intervene as a party?

INDEX

	Page
QUESTIONS PRESENTED.	i
OPINION BELOW.	2
JURISDICTION	6
CONSTITUTIONAL PROVISIONS INVOLVED	6
STATEMENT OF THE CASE.	8
REASONS FOR GRANTING THE WRIT.	15
CONCLUSION	25
APPENDIX - Judgment of Court of Appeals. .	App. 1 1a
Order of New York State Appellate Division.	App. 2 3a

CASES CITED

Blonder-Tongue v. University Foundation, 402 U.S. 313 (1971)	7,24
Commissioner v. Bosch, 387 U.S. 456 (1967).	ii,iii,20
Durfee v. Duke, 375 U.S. 106 .	23
Parklane Hosiery Company v. Shore, 439 U.S. 322 (1979) .	7,24

Page

Phillips, Nizer, etc. v. Rosenstiel, 490 F 2d 509 (1973). 15

SAICI v. Bosurgi, 43 AD 2d 519, case no. 3 (1973) . 3,11

Standefer v. U.S., 48 USLW 4634. 24

Thomas v. Washington Gaslight Company et al., 48 USLW 4930. 21

United States v. Bosurgi, 530 F 2d 1105 5,15

United States v. Bosurgi, 389 F Supp 1088 (SDNY 1975) 5

Yonkers Fur Dressing Co. v. Royal Ins. Co., 247 N.Y. 435. 22

MISCELLANEOUS

The Crime and Punishment of I.G. Farben, J. Borkin, MacMillan Publishing Co., 1978. 19

IN THE

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No.

SAICI,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SAICI*, the petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered May 1, 1980 (Docket

* SAICI is an abbreviation of Sociedad Anonima de Inversiones Comerciales e Industriales.

No. 80-6005), which affirmed the judgment in favor of respondent-plaintiff United States of America, entered in the District Court of the Southern District of New York on motion of the Government because of the alleged failure of SAICI to complete discovery demanded by the Government. (Docket No. 71 Civ. 928-SDNY).

OPINION BELOW

The Court of Appeals affirmed summarily with an oral opinion at the bench.

The District Court in an unreported opinion struck the answer of SAICI, and directed a default judgment for the Government upon the ground that SAICI had not completed all

discovery demanded by the Government. In rejecting SAICI's argument that its New York State Court judgment established its right to the fund in question thereby created ($215,000, now $400,000), the District Court stated:

> "SAICI continues to argue that the State Court judgment against the Bosurgis is binding upon the United States and forecloses all discovery. In view of the holding by the Circuit Court, there is absolutely no basis to this argument."

The judgment and opinion of the New York State Supreme Court, Appellate Division, in favor of petitioner SAICI against the co-defendants Chemical Bank and Bosurgi brothers is reported at SAICI v. Bosurgi, 43 AD 2d 519, case no. 3 (1973).

During the pendency of the pre-trial proceedings, on the Government's

motion to strike the answer of SAICI and to enter a default judgment in favor of the Government because SAICI did not comply with all of the Government's demands for discovery, the United States Magistrate ruled that because of SAICI's sole reliance upon its New York State Court judgment, preclusion, rather than dismissal, was the appropriate sanction. The Magistrate held:

> "SAICI has always contended it will rely on the State Court judgment to establish its claim to the account, and has also maintained that the discovery in question had no relevancy for that reason. The discovery at issue was not directly related to the State Court judgment and, therefore, the striking of SAICI's answer may not be warranted. In my view an order of preclusion appears to be the appropriate sanction."

Earlier, this case was before the United States Court of Appeals on prior cross-appeals involving respective motions by SAICI and the Government for

summary judgment, both of which were denied. United States v. Bosurgi, 530 F 2d 1105. The District Court had granted summary judgment to SAICI, based upon its State Court judgment. United States v. Bosurgi, 389 F. Supp. 1088, 1090-1091 (SDNY, 1975). In that regard the District Court wrote:

> "This action is intimately related to two earlier lawsuits in New York State Courts involving the same parties (except for the United States).
>
> ***
>
> Although the United States was fully aware of the State Court proceedings and informally participated therein, it was not a formal party therein.
>
> ***
>
> In determining the proper regard to be given the State Court proceedings in this particular case, I note that the judgment entered was not a default judgment, but rather was entered on the basis of a motion for summary judgment.
>
> ***
>
> If the government seriously desires to suggest collusion, it must produce some evidence to that effect...It has failed to do so here...I conclude that the State Court proceedings were not collusive.
>
> ***

Thus, there is no reason not to give proper regard to the State Court proceedings herein. Indeed, since such interest as judicial economy are enhanced by allowing competent state tribunals to decide issues of state law (citation) I think that it is proper here to give considerable weight to the fact that the state court has found that SAICI is the owner of the funds in the Chemical Bank account.

***

While the government quibbles about the authenticity of the evidence before the state court, five members of the Appellate Division of the New York Supreme Court found it sufficient to order the state trial court to enter summary judgment on SAICI's behalf. I have already indicated that I feel that considerable regard should be given to the decisions of the state court in this case."

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on May 1, 1980 and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 USC 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

Under Article 4, §1 of the United States Constitution, federal courts are

bound to give to judgments of state courts the same faith and credit that courts of one state must give to judgments of her sister states.

The due process clause of the Fifth Amendment to the United States Constitution is also involved, inasmuch as the Court of Appeals and the District Court deprived SAICI of the fruits of the State Court judgment without a trial or hearing to determine its validity, and force and effect.

STATEMENT OF THE CASE

In 1966, the Bosurgi brothers brought a common law action against the Chemical Bank in New York State Supreme Court, for fraud and misconduct involving wrongful security transactions. The complaint contained no reference to Adriana Bosurgi or her estate. In 1970 a proposed settlement by the Chemical Bank (but never consummated) brought into being the $215,000 fund (now $400,000) to which the Government lays claim for estate taxes asserted to be due because Adriana Bosurgi, allegedly "a non-resident alien, died on March 27, 1963, having approximately $1,000,000 in securities in a security account at the defendant, Chemical Bank." On March 2, 1971 the Government brought this federal lawsuit to reduce to judgment

four jeopardy assessments levied against her estate and to foreclose these tax liens on the settlement fund.

There were no funds or assets in existence when the Bosurgis' State Court suit was brought, nor was redress sought which involved Adriana Bosurgi or her estate, directly, indirectly or derivatively. In 1971, SAICI appeared on the scene and sought to intervene, claiming that it was the victim of the Bank's fraud. The intervention was successfully opposed by counsel for the Bosurgis, the Bank, the parties to the litigation, and by the Government counsel from the sidelines.

SAICI then brought an independent action in the New York State Supreme Court in 1971, and moved for consolidation of its action with the Bosurgi

lawsuit and for summary judgment, which was successfully opposed in like fashion and its application was denied. SAICI appealed. Prosecution of the appeal was delayed pending a conference with the United States Attorney in charge of the matter at the Appellate Division of the Internal Revenue Service, to whom copies of all papers submitted were sent at his request.

Government counsel in a three page letter dated September 14, 1973, wrote the State Appellate Court as "amicus to the court" urging that SAICI's appeal be rejected. The Appellate Division granted the Government leave to file an amicus brief, which the Government did not do. The Appellate Division reversed and granted SAICI's application for consolidation

and for summary judgment. SAICI v. Bosurgi, 43 AD 2d 519, case no. 3 [1973]. It is important to note that in granting summary judgment in favor of SAICI as to the settlement funds involved in the tort action against the Bank, the State Appellate Court expressly acknowledged that "the tax liens, if valid, are not affected" by such determination (SAICI, supra, p. 521). It was our claim that the Government's tax liens were not valid against SAICI, nor could they validly be asserted against the settlement fund inasmuch as the two state lawsuits brought respectively by the Bosurgi brothers and SAICI did not involve any claim by the Estate of Adriana Bosurgi against the Chemical Bank and in no way affected or compromised the ability of

the Government to proceed against the Chemical Bank with respect to any account maintained there by Adriana Bosurgi or for any wrongdoings involving her assets.

Yet, in the opinion last rendered by Judge DUFFY on November 7, 1978 in this federal lawsuit, it is stated:

> "The practical effect of this [the State Court Judgment] would be that Adriana Bosurgi was not the owner of the custody account at her death and, therefore it would not be included as part of her estate."

However, the Government in its brief on the very application on which the foregoing opinion was rendered asserted:

> "Plaintiff [U.S.] has never contended that the Bosurgis' state court action against the Chemical Bank pertained to the Custodian Account in the name of Adriana Bosurgi."

And the Government claimed:

> "More importantly, the source of the $215,000 fund is irrelevant to this tax collection action."

Indeed, in its brief to the Court below on the appeal which gives rise to this application, the Government acknowledged that:

> "SAICI is correct that the source of the fund is not relevant to the tax collection aspects of this case."

Yet, what the Government has accomplished here is the striking out of SAICI's pleading grounded on the validity of its New York State judgment; this, in order to seize the settlement funds that SAICI was and is entitled to receive thereunder. It was SAICI's claim that its right to the settlement fund was invulnerable and not subject to the Government's tax claims against the Estate of Adriana Bosurgi because its State Court judgment giving SAICI title thereto rendered in a contested litigated proceeding was entitled to

full faith and credit. The onerous discovery proceedings were a procedural gambit as will be demonstrated that resulted in an unconstitutional denial to SAICI of due process.

Counsel for the Bosurgis who rendered arduous services both here and abroad was instrumental in exposing the Bank's wrongdoings which resulted in the initial aborted settlement. Although recognizing the worth of his services SAICI successfully contended that it was not bound by his retainer with the Bosurgis. The New York State Appellate Division sustained that contention and directed a hearing at which Justice KAPELMAN before whom all proceedings were held took testimony on the issue as to the legal fees to be awarded and, as we pointed out below,

"literally forced the settlement as to fees that was placed upon the record."*

REASONS FOR GRANTING THE WRIT

The Government's theory is that it may rightfully ask a federal court to review the sufficiency of the evidence upon which the Appellate Division of the New York Supreme Court

* Justice KAPELMAN "was in a far better position to determine the reasonable compensation" for the services rendered in the State Court action by Mr. Ginsberg (cf. FRIENDLY, J. in Phillips, Nizer, etc. v. Rosenstiel, 490 F 2d 509, 518-19 [1973]) because of his personal knowledge of all aspects of the state lawsuit. The Court of Appeals rejected his determination, erroneously concluding that the parties "merely adopted a stipulation between SAICI and Ginsberg as to the amount of the fees" (see U.S. v. Bosurgi, 530 F 2d 1105, footnote 8, at p. 1113) and ruled that the Federal District Court "should determine whether the sum [awarded by Justice KAPELMAN] is reasonable compensation". SAICI's request to call Mr. Justice KAPELMAN as a witness to these facts was rejected. The disregard of the State Court judgment in this respect and the denial of the hearing requested likewise, we submit, constitute a denial of due process. The State Court judgment as to this issue was also entitled to full faith and credit.

granted summary judgment to SAICI, by virtue of which title to the $215,000 fund constituting the Bank's monies was vested in SAICI. Review of the judgment, it is respectfully submitted, could only have been sought by way of appeal to the New York Court of Appeals, either by the Bank or by the Bosurgis. We contend that our State Court judgment was invulnerable.

SAICI was under no duty to satisfy any other court as to the sufficiency and adequacy of its evidence, which the Appellate Division of the New York Supreme Court held sufficient to warrant the granting of summary judgment. SAICI is entitled to establish the integrity of its State Court judgment, not by any further demonstration as to the authenticity of its

documentary proof, but simply by a demonstration that the judgment was rendered in a contested lawsuit and was the result of procedural and substantive due process in the State Court. The constitutional posture of SAICI's position was accurately and succinctly set forth as follows:

> "[B]oth here and before Magistrate BERNIKOW, we have with meticulous care demonstrated that the sole controlling issue to be tried is the validity of SAICI's state court settlement judgment that we respectfully submit can be quickly and expeditiously determined. SAICI's motion for an immediate trial thereof should be granted so that this unduly prolonged litigation may be brought to an end.
>
> SAICI cannot be deprived of its constitutional right to have that issue heard and determined. SAICI's pleading may not be stricken in order to thwart its right to a trial of that issue by the procedural maneuvering resorted to by government counsel who obviously can vindicate any government tax claim it may have and can prove against Adriana's estate by proceeding against the bank whose alleged fraud and conversion can be shown to have resulted in the impairment or the obliteration of the assets in that account."

SAICI was formed in 1954. The Government

demanded, among other onerous requests, the following:

> "4. Identify every person who has served as an officer of SAICI since its incorporation or formation and for each such person, state his position, his duties, and the years he held such position.
>
> 5. Identify every person who was a stockholder or partner in SAICI during each year since its incorporation or formation and for each such person state the number of shares owned or the percentage of his interest."

SAICI's response was:

> "4. The formation of SAICI took place as follows:
>
> (a) W. Sanderson & Sons was an Italian company apparently engaged in the business of producing citrus by-products. It was an old company of well-known international reputation.
>
> (b) Sanderson & Sons, Italy, was determined to do business in Argentina, then under the control of the Peron Government, which was solicitous of industries established by foreigners.
>
> (c) However, the Italian Government prohibited removal of capital from Italy so it was necessary to obtain capital for the Argentinian business from other sources.
>
> (d) This was accomplished by the formation of SAICI. A group of anonymous businessmen formed SAICI in Uruguay for the purpose of supplying the capital for the

> construction of a plant in Argentina for Sanderson and for its initial working capital. In addition, SAICI provided working capital and funds whenever they were needed by Sanderson, Argentina, whose factory was set up at Concordia, Argentina.
>
> 5. We are unable to identify every person who was a stockholder or partner in SAICI during each year since its incorporation or formation because SAICI is a 'societa anonime' whose stock was in bearer form; the bearer appears at stockholders' meetings to vote, purely on the basis of possession of the shares of stock, which the holder exhibits in order to vote, without revealing whether the bearer is the true owner or a representative of the true owner; this, according to Prof. Avv. Domenico Barillaro, who has been acting as SAICI's representative, is the conventional form in which such securities were owned."

As pointed out by Joseph Borkin, former Chief of the Cartel Section in the Department of Justice, the purpose of the formation of a "Societa Anonime" evidently was to prevent disclosure of corporate interests which may result in a hostile Government and official seizure or penal sanctions.*

* The Crime and Punishment of I.G. Farben, MacMillan Publishing Co., 1978, p. 162.

SAICI's failure to respond to the voluminous Government interrogatories was neither wilful nor, as Magistrate BERNIKOW suggested, did it warrant the striking of its answer. At best, as he correctly observed, "[A]n order to preclude appears to be the appropriate sanction."

SAICI's State Court judgment is entitled to full faith and credit since it was an adjudication between SAICI and the Bank and had no reference to Adriana Bosurgi or her estate. The decision below is in conflict with this Court's determination in Commissioner v. Bosch, 387 U.S. 456, 457, 464 [1967], which requires that "proper regard" must be given to State Court judgments adjudicating property rights. Moreover, as Mr. Justice STEVENS recently reiterated:

> "It has long been the law that 'the judgment of a state court should have the same credit, validity, and effect, in every other court in the United States, which it had in the state where it was pronounced.' Hampton v. McConnel, 3 Wheat. 234, 235 (Marshall, C.J.). See also Mills v. Duryee, 7 Cranch 481, 484 (Story, J.). This rule, if not compelled by the Full Faith and Credit Clause itself, see no. 18, infra, is surely required by 28 U.S.C. § 1738, which provides that the 'Acts, records and judicial proceedings... [of any State] shall have the same full faith and credit in every court within the United States... as they have by law or usage in the courts of [the] State... from which they are taken.'"*

The Bank could not and did not claim that the aborted settlement with the Bosurgi brothers or the succeeding judicial settlement with SAICI were induced by any fraud perpetrated by either upon the Bank, since such settlements were predicated upon the Bank's alleged wrongdoing. Yet, in its brief below the Government asserted:

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* Thomas v. Washington Gaslight Company et al., 48 USLW 4930, 4933.

> "The Government's claim is of a fraud upon it in the collusive obtaining of the State Court judgment by the Bosurgis and SAICI."

Assuming, arguendo, there was such collusion in obtaining the State Court judgment, its impact and effect was solely upon the Bank, since it resulted in vesting title to the Bank's monies, i.e. the settlement of $215,000 in favor of SAICI. The Bank makes no such claim, nor can it. Indeed, it is well settled under New York law that a settlement "is final and is to be sustained by the Court without regard to the validity of the original claim." Yonkers Fur Dressing Co. v. Royal Ins. Co., 247 N.Y. 435, 444. The State Court judgment, insofar as the Bank is concerned, is therefore invulnerable and entitled to full faith and credit.

Moreover, SAICI's suit and the resulting settlement judgment does not

and did not prevent the Government from proceeding against the Bank in behalf of the estate, as alleged owner of the custodian account, in order to support and justify the Government's tax claims with respect thereto, since the estate of Adriana Bosurgi was not a party to the action, nor did the Bank demand or receive any release from liability to the estate.

The sole issue before the District Court and the Court of Appeals as well was whether the issues in the State Court litigation "have been fully and fairly litigated" as between SAICI and the Bank. Durfee v. Duke, 375 U.S. 106, 111. SAICI's readiness and request for immediate trial of that issue was unconstitutionally rejected.

Finally, this case calls for the

application of the doctrine of non-mutual collateral estoppel to prevent the Government from relitigating SAICI's right to the fund provided by the Bank in settlement of SAICI's State Court lawsuit, title to which was adjudged in SAICI by its State Court judgment, especially since as already noted, the Government had full opportunity to participate therein and rejected the New York State Appellate Division's invitation to submit a brief amicus to the Court. Although not formally a party, the Government undertook to exercise, so to speak, a "laboring oar". cf. Blonder-Tongue v. University Foundation, 402 U.S. 313 [1971], and Parklane Hosiery Co. v. Shore, 439 U.S. 322 [1979], recently considered by this Court in Standefer

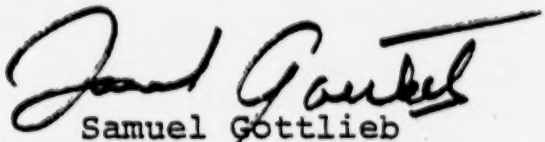
v. U.S. 48 USLW 4634, 4637. Here too, the "application of nonmutual collateral estoppel" would promote "judicial economy" and would conserve "private resources without unfairness to the litigant against whom estoppel was invoked", since SAICI's State Court judgment did not detrimentally affect or interfere with any claim, tax or otherwise, that the Government may have against Adriana Bosurgi, her estate, or against the Bank with respect to any funds or assets of Adriana Bosurgi or her estate.

CONCLUSION

The questions presented, which involve the striking of SAICI's pleading because of its alleged failure to comply with the Government's inordinate demand for discovery, and which resulted in the denial of full faith and credit to

SAICI's State Court judgment, viewed both from the procedural and substantive standpoints, are of sufficient constitutional magnitude to warrant review by this Court.

Respectfully submitted



Samuel Gottlieb
Attorney for Petitioner

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of May one thousand nine hundred and eighty.

Present: HON. WALTER R. MANSFIELD
Circuit Judge

HON. WILLIAM H. TIMBERS
Circuit Judge

HON. DUDLEY B. BONSAL
District Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee

- v -

LEON BOSURGI AND EMILO BOSURGI, etc. et al.,

Defendant.

SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the Court's oral opinion in open court with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

by· Arthur Heller,
Deputy Clerk

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 8, 1973.

Present--Hon. Owen McGivern Justice Presiding
Arthur Markewich
Theodore H. Kupferman
Myles J. Lane
Aron Steuer Justices.

STATE COURT JUDGMENT

Sociedad Anonima de Inverniones Comerciales e Industriales

Plaintiff-Appellant-Respondent, Action No. 1

-against-

Leon Bosurgi and Emilio Bosurgi,

Defendants-Respondents,

-and-

Benedict Ginsberg,

Defendant-Respondent-Appellant.

Leone Bosurgi and Emilio Bosurgi,

Plaintiffs, Action No. 2

-against-

Chemical Bank New York Trust Company,

Defendant-Respondent.

Cross-appeals having been taken to this Court by the plaintiff-appellant-respondent and defendant-respondent-appellant from the order of the Supreme Court, New York County (Kapelman, J.), entered on August 22, 1972, denying without prejudice plaintiff's motion for an order of consolidation, or concurrent consideration and for summary judgment, and denying defendant Ginsberg's cross-motion for an order fixing his fee,

And said cross-appeals having been argued by Mr. Samuel Gottlieb of counsel for plaintiff-appellant-respondent, by Mr. Benedict Ginsberg, defendant-respondent-appellant, pro se, and by Mr. Andrew P. Adelman, of counsel for defendant-respondent; and due deliberation having been had thereof, and upon the memorandum decision of this court filed herein,

It is unanimously ordered that the order so appealed from insofar as it (1) denied plaintiff's motion be and the same hereby is reversed, on the law, and the motion granted, and (2) denied defendant Ginsberg's cross-motion be and the same hereby is modified, on the law and the facts, and the cross-motion granted only to the extent of a remand for a hearing to determine the fixation of fees, all without costs and disbursements.

ENTER

HYMAN W. GAMSO
Clerk

Supreme Court, U. S.
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JUL 30 1980
MICHAEL RODAK, JR., CLERK

NO. 80-106

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OCTOBER TERM, 1980

SAICI,

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V.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL APPENDIX

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OPINION OF JUDGE DUFFY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

Plaintiff,

-against-

LEONE BOSURGI and EMILIO BOSURGI, as Executors of the Estate of Adriana Bosurgi, Deceased; CHEMICAL BANK, as Statutory Executor of the Estate of Adriana Bosurgi, Deceased; LEONE BOSURGI and EMILIO BOSURGI; SOCIEDAD ANONIMA de INVERSIONES COMERCIALES e INDUSTRIALES and BENEDICT GINSBERG,

Defendants.

71 Civ. 928 (KTD)

OPINION

----------X

APPEARANCES:

HON. ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
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Chemical Bank
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Comerciales e Industriales

BENEDICT GINSBERG, ESQ.
Defendant, Pro Se
Attorneys for Defendants
Leone Bosurgi and Emilio Bosurgi

KEVIN THOMAS DUFFY, D.J.:

This case has a long and tortured history, much of which is set forth in United States v. Bosurgi, 530 F.2d 1105, 1112 (2d Cir. 1976). The suit was originally commenced by the United States against Leone and Emilio Bosurgi (hereinafter collectively referred to as the "Bosurgis" or "the Bosurgi brothers"), individually and as Executors of the Estate of Adriana Bosurgi and against Chemical Bank, as the Statutory Executor of the Estate of Adriana Bosurgi to recover estate taxes allegedly due upon the Estate of Adriana Bosurgi. Apparently, the only assets located within the United States to pay these estate taxes were those represented by a custodian account in the name of Adriana Bosurgi managed by

Chemical Bank. When she died, the account was transferred to the names of her two sons, Leone and Emilio. Shortly thereafter, Benedict Ginsberg was retained as the Bosurgi brothers' attorney to bring suit in New York State Supreme Court against the bank for damages caused by its alleged mismanagement of the custodian account. That action was settled in September, 1970 by the bank's promise to pay the Bosurgis $215,000.

Thereafter, in 1971, the instant suit for taxes assessed against the Bosurgi estate was instituted and an order entered restraining the bank and the Bosurgis from transferring the funds. The order was later modified to permit Ginsberg, as custodian of the $215,000, to invest in certificates of

deposit. Benedict Ginsberg and the Estate of Adriana Bosurgi were added as defendants by Chemical Bank's answer.

During the pendency of this action and despite the Southern District's custody of the $215,000, Sociedad Anonima de Inversiones Comerciales e Industriales (hereinafter referred to as "SAICI") brought suit in the Supreme Court, New York County against the Bosurgis and Ginsberg. Based on a December 10, 1954 financing agreement between Adriana Bosurgi, the Bosurgi brothers and SAICI, the latter claimed ownership of the fund in the federal court's custody.

In response to SAICI's summary judgment motion in the State Court, Ginsberg filed an October 12, 1973 affidavit indicating that the Bosurgis

conceded the existence of the December 10th agreement and, consequently, could not oppose SAICI's motion. He did, however, oppose the motion only insofar as he sought an order requiring payment of his $78,491 fee.

Although unopposed, SAICI's motion was denied by the New York Supreme Court because the federal court had jurisdiction over the res. On appeal the Appellate Division, Second Department, reversed, granting SAICI's request for summary judgment. In so doing, the Court stated that the federal government's tax lien on the fund would not be effected.

Relying heavily on the decision of the Appellate Division, I later granted SAICI's motion for summary judgment in the federal action.

United States v. Bosurgi, 389 F.Supp. 1088 (S.D.N.Y. 1975). The Court of Appeals disagreed and directed that the matter proceed to trial.

It is imperative to note that in reversing the grant of summary judgment, the Court of Appeals expressly held that the decision of the Appellate Division was not binding on the parties in the federal action. Indeed, the Court reasoned that

> Since the federal court first assumed jurisdiction over the $215,000 fund, the ownership of which is in dispute, economy of judicial resources and avoidance of conflicting results would not appear to be served by giving controlling effect to the later adjudication of another court which did not have control over the fund. However, we need not resolve that issue; even if due regard is accorded to the state court's adjudication, see Commissioner v. Bosch, 387 U.S. 456, 87 S.Ct. 1776, 18 L.Ed. 2d 886 (1967), it would be only as valid as its evidentiary base. We have not hesitated to disregard state court judgments affecting federal tax liability where the factual questions involved were not contested in the

state court, see Lowe v. Commissioner, 510 F.2d 479 (2d Cir.), cert. denied, 423 U.S. 827, 96 S.Ct. 44, 46 L.Ed.2d 44, 44 U.S.L.W. 3201 (1975) or where a lower state court made an erroneous application of state law, see Cheng Yih-Chun v. Federal Reserve Bank, 442 F.2d 460 (2d Cir. 1971). Here also there are sound reasons for not adhering to the Appellate Division's decision. SAICI's motion for summary judgment in the state court action was unopposed. The state court, basing its decision on an attorney's hearsay affidavit regarding the authenticity of the Bosurgi-SAICI correspondence, did not have before it the conflicting evidence submitted in the federal suit by the government, which was not a party to the state court proceeding. The additional evidence raises a clear issue regarding the ownership of the Chemical Bank account. Under the circumstances, the state court's decision, even given proper regard, did not necessitate a federal grant of summary judgment. (footnote omitted)

United States v. Bosurgi, 530 F.2d 1105, 1112 (2d Cir. 1976).

In the face of this holding by the Second Circuit, SAICI still takes the audacious position that it will not in any way permit discovery with respect to the factual issues which were remanded to this Court for trial. In order to prepare for trial, the United States has

continually attempted to obtain information through the ordinary discovery processes.

First, the government served SAICI with interrogatories and a request for documents on October 12, 1976. A motion to compel answers thereto was denied without prejudice to its renewal after compliance with Rule 9(f) of the general rules of this Court which requires that the parties confer as to these matters prior to making such protective motions. The necessary conference was held at which counsel for SAICI promised to answer most of the interrogatories and produce most of the documents requested. On December 22, 1977, plaintiff again moved for an order compelling answers to the interrogatories and the documents requested. That motion

was referred to Margistrate Bernikow. SAICI finally served and filed what purported to be its answers to interrogatories and requested documents. As the government felt such answers were "so incomplete as to be worthless", a hearing was held before Magistrate Bernikow on May 4, 1978, at which the Magistrate directed that SAICI "answer within thirty days, fully and completely, the interrogatories as set forth."

On June 2, 1978 the plaintiff, the United States, received SAICI's answers to interrogatories. With the exception of one affidavit, SAICI failed to produce a single document requested by the plaintiff and most of the answers were deficient. The plaintiff renewed its motion for sanctions under Rule 37 of the Federal Rules and another hearing was held

before Magistrate Bernikow.

Thereafter, on October 23, 1978, Magistrate Bernikow filed a memorandum and order in which he found that "[a] review of the answers to the interrogatories show that they are evasive, incomplete and unresponsive. Moreover, with the exception of one affidavit, no documents were produced in response to the document request." The Magistrate further held that the failure of SAICI had been wilfull and precluded SAICI from offering into evidence any of the documents indicating the origin of its claim for the moneys involved herein.

Meanwhile, a notice to take the deposition of SAICI scheduled for October 5, 1978 was served and filed. In turn, SAICI sought an order directing an

immediate trial and for a stay of any and all pretrial proceedings pending such determination. By Memorandum dated November 7, 1978, the protective order and request for immediate trial were denied. I ordered SAICI to appear and testify at a properly noticed deposition. Apparently, neither counsel for the United States nor counsel for SAICI learned of this order until the end of May, 1979. On May 30, 1979, a new and proper notice to take SAICI's deposition on June 25, 1979, was served. By letter dated June 22, 1979, SAICI's counsel advised that no representative of SAICI would appear at the deposition. Counsel also indicated that the refusal was based, in part, on the fact that the Order of November 7, 1978, had been entered prior to the time a

reply memorandum had been filed in support of SAICI's motion for a protective order. SAICI's counsel also requested a conference in connection with this matter.

On July 27, 1979 the plaintiff, the United States of America, moved for "further sanctions" against SAICI pursuant to Fed.R.Civ.P. 37(b)(2) and (d). Thereafter, oral argument was had in connection with this motion and counsel for SAICI was given the opportunity to reply to the motion in writing. This was filed August 23, 1979.

SAICI continues to argue that a State Court judgment against the Bosurgis is binding upon the United States and forecloses all discovery. In view of the holding by the Circuit

Court, there is absolutely no basis to this argument. A secondary argument advanced by SAICI is that the government can obtain its State taxes from other funds held by the Bosurgis or from the Chemical Bank. There does not appear to be any basis for this argument since the Bosurgis apparently have no assets located in this country. As for Chemical Bank, release of the assets would require a relitigation of the ownership of the account held in the name of Adriana Bosurgi, precisely what SAICI is unwilling to permit in this suit.

It is clear to this Court that the position taken by SAICI refusing to permit discovery is one which will not change by the imposition of further sanctions other than the

most drastic sanction. Accordingly, the answer of SAICI is stricken in its entirety and a default judgment against SAICI will be entered on behalf of the United States.

Settle judgment on five days' notice.

(sgd.) KEVIN THOMAS DUFFY
U. S. D. J.

Dated: New York, New York
December 12, 1979

Supreme Court, U. S.
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No. 80-106

In the Supreme Court of the United States

OCTOBER TERM, 1979

SAICI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
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TABLE OF AUTHORITIES

Page

Cases:

Aerojet-General Corp. v. *Askew*, 511 F. 2d 710 6

Al Barnett & Son v. *Outboard Marine Corp.*, 611 F. 2d 32 4

Commissioner v. *Estate of Bosch*, 387 U.S. 456 5

Diapulse Corp. of America v. *Curtis Publishing Co.*, 374 F. 2d 442 4

Emerick v. *Fenick Industries, Inc.*, 539 F. 2d 1379 4

Estate of Smith v. *Commissioner*, 510 F. 2d 479, cert. denied, 423 U.S. 827 6

Montana v. *United States*, 440 U.S. 147 6

National Hockey League v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 4

Paine, Webber, Jackson & Curtis, Inc. v. *Inmobiliaria Melia de Puerto Rico, Inc.*, 543 F. 2d 3, cert. denied, 430 U.S. 907 4

Parklane Hosiery Co. v. *Shore*, 439 U.S. 322 6

Societe Internationale v. *Rogers*, 357 U.S. 197 4

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 80-106

SAICI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the entry of a default judgment against it in this suit by the United States against Leone and Emilio Bosurgi, individually and as executors of the Estate of Adriana Bosurgi, to recover estate taxes allegedly due upon the Estate of Adriana Bosurgi.

The pertinent facts may be summarized as follows: Adriana Bosurgi died on March 27, 1963. At the time of her death, she owned a custodial account with the Chemical Bank of New York containing securities worth more than $1 million. The securities were then transferred to her two sons, Leone and Emilio, who also entered into a custodial account agreement with the Chemical Bank. In 1966, the Bosurgis brought an action in a state court

against the bank for mismanagement of their account. That action was settled with the bank's promise to pay $215,000 to them. On March 2, 1971, the Internal Revenue Service made three assessments against the Bosurgi brothers for estate taxes due from their mother's estate. On the same day, it brought the present action in the United States District Court for the Southern District of New York to foreclose the resulting tax liens on the $215,000 fund derived from the Bosurgi-Chemical Bank settlement. The district court assumed custody of the $215,000 fund (A. 4-5).[1]

On June 2, 1971, petitioner SAICI[2] brought an action in a state court against the Bosurgis, claiming ownership of the settlement fund by virtue of a financing agreement entered into on December 10, 1954, between petitioner, Mrs. Bosurgi, and the Bosurgi brothers. Petitioner filed a motion for summary judgment, which was not opposed by the Bosurgis; indeed, they conceded the existence of the December 10th agreement. Although the trial court initially denied the motion because the federal court had jurisdiction over the res, the Appellate Division of the New York Supreme Court reversed, granting petitioner's motion for summary judgment. In so doing, the court stated that the federal government's tax lien on the fund would not be affected (A. 5-6).

Meanwhile, in the federal court action, petitioner, which the government had joined as a defendant, moved for summary judgment, based upon the state court's determination that it owned the fund in question. The

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[1]"A." refers to the district court's opinion reproduced in the joint appendix filed in the court of appeals.

[2]SAICI is the acronym for Sociedad Anonima de Inversiones Commerciales e Industriales.

district court granted petitioner's motion, but the court of appeals reversed. *United States* v. *Bosurgi,* 530 F. 2d 1105 (2d Cir. 1976). The court expressly ruled that because the state court did not control the fund, its judgment was not binding on the federal court which had assumed custody of the fund. At all events, the court of appeals held that the state court judgment did not control the federal action because petitioner's motion for summary judgment was unopposed, and the state court did not have before it the conflicting evidence submitted in the federal suit by the government, which was not a party in the state court proceeding (530 F. 2d at 1112).

On remand, petitioner resisted all attempts at discovery. After initially failing to respond to the government's written interrogatories and requests for documents, petitioner ultimately submitted answers that were incomplete. At a hearing held by the magistrate, petitioner was directed to answer "fully and completely." When petitioner failed to comply, the magistrate, after a second hearing, found that petitioner's answers to the interrogatories were evasive, incomplete, and unresponsive; that the requested documents had not been produced; and that petitioner's failure to respond properly had been willful. Accordingly, the magistrate ruled that petitioner could not offer into evidence any of the documents underlying its claim of ownership of the fund (A. 8-9).

The government also filed and served a notice to take petitioner's deposition. Petitioner then sought an order directing that an immediate trial be had to determine the binding force of the judgment obtained in the state court and for a stay of all pretrial proceedings pending such a determination. The district court denied petitioner's motion, and instead ordered petitioner to appear and testify at a properly noticed deposition. The government

served a new notice to take petitioner's deposition, and petitioner again failed to produce a representative for the taking of its deposition. Subsequently, in a conference with the district judge, petitioner reiterated its position that the state court judgment against the Bosurgis was binding on the United States and foreclosed all discovery. As a result, the court struck petitioner's answer and entered judgment for the United States (A. 9-11). The court of appeals affirmed (Pet. App. 1a-2a).

1. The decision below correctly upheld the default judgment entered against petitioner. The standard for determining whether a default judgment was properly entered for refusals to comply with court orders directing discovery is whether the district court abused its discretion. *E.g., National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642-643 (1976); *Diapulse Corp. of America* v. *Curtis Publishing Co.*, 374 F. 2d 442, 447 (2d Cir. 1967). It is well settled that a district court may impose the sanction of a default judgment when a party willfully refuses to comply with an order to respond to requests for discovery (see, *e.g., Al Barnett & Son* v. *Outboard Marine Corp.*, 611 F. 2d 32, 35 (3d Cir. 1979); *Paine, Webber, Jackson & Curtis, Inc.* v. *Inmobiliaria Melia de Puerto Rico, Inc.*, 543 F. 2d 3, 6 (2d Cir. 1976), cert. denied, 430 U.S. 907 (1977)). Since petitioner willfully refused to comply with two of the district court's orders directing it to respond to the government's requests for discovery, the district court did not abuse its discretion in entering default judgment (cf. *Emerick* v. *Fenick Industries, Inc.*, 539 F. 2d 1379, 1381 (5th Cir. 1976)).

Petitioner suggests (Pet. 18-20) that a default judgment was inappropriate because it was unable to provide all the requested information. Cf. *Societe Internationale* v. *Rogers*, 357 U.S. 197, 213 (1958). But it is impossible to

assess the accuracy of petitioner's assertion because it has provided virtually no information about itself. At the very least, petitioner could have produced a representative for the noticed deposition who had first-hand knowledge of its operation.

Petitioner's basic position (Pet. 13-14, 16-17, 22), however, is that there was no question of fact to be discovered, because its right to the settlement fund was "invulnerable" by reason of the state court judgment. Petitioner argues (Pet. 20-21) that by refusing to give full faith and credit to that state court judgment, the decision below is in conflict with this Court's decision in *Commissioner* v. *Estate of Bosch,* 387 U.S. 456 (1967). In *Bosch, supra,* this Court held that where federal courts are faced with determining federal estate tax consequences in cases that turn on state law, they must, in the absence of a decision by the highest court of the state, "apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State" (387 U.S. at 465).

But as the court of appeals correctly held, "even if due regard is accorded to the state court's adjudication, * * * it would be only as valid as its evidentiary base."[3] Here, it went on to hold, there were sound reasons for not adhering to the state court's decision. First, since petitioner's motion for summary judgment in the state court action was unopposed, the federal district court was amply justified in disregarding such a judgment for purposes of determining federal tax liability where the factual questions involved were not contested in the state

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[3]The court of appeals questioned at the outset whether a determination under *Bosch* was necessary because the federal court, and not the state court, had first assumed jurisdiction over the $215,000 fund in question. *United States* v. *Bosurgi, supra,* 530 F. 2d at 1112.

court. *Estate of Smith* v. *Commissioner,* 510 F. 2d 479 (2d Cir.), cert. denied, 423 U.S. 827 (1975); cf. *Aerojet-General Corp.* v. *Askew,* 511 F. 2d 710, 720 (5th Cir. 1975). Second, since the state court based its decision on an attorney's hearsay affidavit regarding the authenticity of the Bosurgi-SAICI correspondence, it did not have before it the conflicting evidence submitted in the federal suit by the government, which was not a party to the state court proceeding. Thus, the state court's decision was given "proper regard," but still found not to be controlling in light of the factual circumstances of the state court litigation.

2. Nor is the government foreclosed from asserting the Bosurgis' ownership of the fund by the doctrine of non-mutual collateral estoppel, as petitioner asserts (Pet. 23-25). Whether the doctrine is used offensively or defensively, it may apply where the party against whom estoppel is asserted has litigated and lost in an earlier action. *Parklane Hosiery Co.* v. *Shore,* 439 U.S. 322 (1979). However, the doctrine does not apply here where the party against whom estoppel is asserted, *i.e.,* the United States, was not a party to the earlier state court action and has not litigated or lost anything.

Petitioner asserts further (Pet. 10, 24) that the government was informed of the state court proceedings, that it was invited to file an amicus brief in those proceedings, and that it applied a "laboring oar." Since the state court proceeding involved only an unopposed motion for summary judgment, it is difficult to see where any "laboring oar" was applied. This is not a case where the United States, although a nonparty, assumed control over litigation in which it had a direct financial interest. The principles of collateral estoppel therefore do not apply. Cf. *Montana* v. *United States,* 440 U.S. 147, 153-155 (1979).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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NO. 80-106

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SAICI,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Pages

PETITIONER'S REPLY MEMORANDUM. 1

THE BROAD DISCOVERY AVAILABLE TO AND AVAILED OF BY THE GOVERNMENT . . 12

CASES CITED

Durfee v. Duke, 375 U.S. 106. 16

Montana v. United States, 440 U.S. 827. . . . . 11, 12

Oscanyan v. W. R. Arms Co., 103 U.S. 261. 7

United States v. Bosurgi, 530 F. 2d 1105 (2d Cir. 1976) . . . 2,9,10

United States v. Dibble, 429 F. 2d 598 (9th Cir. 1970) . . . 16

Yonkers Fur Dressing Co. v. Royal Insurance Co., 247 N.Y. 435. 8

IN THE
SUPREME COURT OF THE UNITED STATES

SAICI,

Petitioner,

v. 80-106

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY MEMORANDUM

The Government's memorandum begins with the demonstrably fundamental erroneous statement that "the Bosurgis brought an action in a state court against the [Chemical] bank for mismanagement of their account" that "was settled with the bank's promise to pay $215,000 to them" (pp. 1-2) which if correct, we acknowledge, would undermine our constitutional

challenge to the Government's seizure of those funds amounting to $400,000 awarded to SAICI by the New York State Court judgment. The record and indeed the admissions of the Government are directly to the contrary.

Leone and Emilio Bosurgi brought a common law action in the New York State Supreme Court against the bank for fraud, conversion and misconduct involving the bank's wrongful security transactions. The Government's brief (p. 3) on the initial appeal which reversed the granting of SAICI's motion for summary judgment (U.S. v. Bosurgi, 530 F.2d 1105 [2d Cir. 1976]) concedes that there were no funds in existence at the time the suit was instituted and that it was "based upon

alleged mismanagement of the account by Chemical Bank, which reduced its value to zero."

The complaint in the Bosurgi lawsuit contained no reference to Adriana Bosurgi or her estate. The attorney for the Bosurgis, Mr. Ginsberg, testified when examined by the Government in pretrial deposition that at the time that he brought suit he did not even know of Adriana's existence. Furthermore, the undisputed court records and proceedings heretofore had below indicate that:

> "No funds, assets, securities, claims or causes of action belonging to Adriana Bosurgi or to her estate, were involved, nor did such settlement affect or impair, or impede the rights of anyone, including the Government, or the bank itself, against her estate." (A50-1)*

* * *

* A refers to appellant SAICI's Appendix.

> "The bank received no release of any kind from or on behalf of the estate. In the state court litigation, the bank did not claim***that the claims of wrongdoing and fraud which were alleged and settled, if perpetrated by the bank, were perpetrated only against the estate." (A51)

Thus, the only party who could conceivably claim any damage perforce of the state court judgment if SAICI's claim was untenable would be the bank.

Understandably, SAICI was and is entitled to rely on the integrity of its state court judgment which was unconstitutionally disregarded below.

Moreover, the Government acknowledges in its prior brief to the court below (p. 3) that this action was "tentatively settled" by the bank and was not consummated because of a dispute between Mr. Ginsberg and bank

counsel which had not been resolved when SAICI appeared on the scene. SAICI's intervention in the lawsuit, as our petition points out, was successfully resisted by all, the Bosurgis, the bank, Mr. Ginsberg and the Government, as we have said, from the sidelines. SAICI then brought an independent lawsuit and was successful in the contested proceeding that thereafter developed, on the basis of documentary proof the veracity of which Mr. Ginsberg was constrained to acknowledge and which the bank could not and did not refute. Indeed, at the New York State Appellate Division the bank in its brief stated that it "takes no position on the merits of plaintiff's [SAICI's] summary judgment motion"; since the bank's funds were involved

it had every right to challenge the authenticity of the documents relied on and indeed was in the best position to do so because of the close and covert relationship that existed between the bank and the Bosurgis since 1954.* As to the position so taken by the bank's

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* From the very inception of the banking relationship, as Mr. Ginglen, the bank official in charge of the matter testified in the State Court action and reaffirmed it in the deposition taken by the Government:

"Q You got your instructions from him [Leone Bosurgi] then from 1949, is that correct?

A He was the only one I had contact with.

* * *

Q He was the only one, isn't that correct?

A He was the only one that issued instructions on the account.

Q You never spoke to Adriana Bosurgi along those lines at any time, did you?

A I had no contact with her except when the custodian account opened.

Q Only in connection with the opening of the custodian account?

A Correct." (A 58)

Although Adriana was designated "owner" of the custodian account, her sons, the Bosurgis had an unlimited power of attorney with respect thereto; she evidently was merely their nominee. (A 61)

counsel, as this Court in Oscanyan v. W.R. Arms Co., 103 U.S. 261, 263, stated:

> "Any fact bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure, equally as if established by the clearest proof."

The foregoing applies as well to the acknowledgment by Ginsberg, Bosurgis' attorney, as to the authenticity of the documentary matter submitted in the State Court, upon the basis of which summary judgment was granted and the ultimate judgment entered, from which no appeal was taken.

The impact of SAICI's State Court judgment and the liability imposed was solely against the bank and the bank's funds furnished in settlement and satisfaction thereof. Neither the Government nor the estate of

Adriana Bosurgi had the right to oppose such disposition since their rights, if any, against the bank were not impeded, impaired or legally affected thereby.

Even if it were to be assumed that the bank wrongfully and deliberately defaulted and willfully failed to challenge the validity of SAICI's claims, which the bank was not and is not accused of doing, SAICI's State Court judgment against the bank and as to the bank's funds is invulnerable (Yonkers Fur Dressing Co. v. Royal Insurance Co., 247 N.Y. 435, 444). Hence there is no ground, as the Government's opposing memorandum here asserts (p. 5) for not adhering to the State Court decision, on the basis that the Court of Appeals in reversing summary judgment for SAICI held that "even if

due regard is accorded to the State Court's adjudication* * *it would be only as valid as its evidentiary base."* The limitation of the judgment to "an evidentiary base" we submit cannot constitutionally be sustained.

The Court of Appeals in its prior opinion reversing SAICI's summary judgment did not rule, as the Government contends (p. 3), that SAICI's "judgment was not binding on the federal court which had assumed custody of the fund" but stated "it must resolve all ambiguities and draw all reasonable inferences in favor of the party [the Government] against whom summary judgment is sought ...with the burden on the moving party [at trial] to demonstrate the absence of any material factual issue genuinely

* U.S. v. Bosurgi, supra, 530 F.2d at p. 1112.

in dispute," (530 F.2d at p. 1110).*

Indeed, on the appeal below, the following disavowal of the position previously taken by the Government on the prior appeal was ignored:

> "Plaintiff [U.S.] has never contended that the Bosurgis' state court action against the Chemical Bank pertained to the Custodian Account in the name of Adriana Bosurgi." (A 49)

Also:

> "More importantly, the source of the $215,000 fund is irrelevant to this tax collection action." (A 49)

And indeed, in its brief below (p. 28):

> "SAICI is correct that the source of the fund is not relevant to the tax collection aspects of this case."

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* The Court of Appeals in affirming the "denial of the Government's motion for summary judgment" observed that "the circumstantial evidence underlying the Government's motion is insufficient in view of the December 1954 agreement (the authenticity of which is not seriously disputed by the Government) to warrant a grant of summary judgment" (U.S. v. Bosurgi, 530 F.2d at pp. 1112-13).

Finally, the Government citing Montana v. United States, 440 U.S. 827, contends (p. 6) that the doctrine of nonmutual collateral estoppel does not apply here. We do not contend that SAICI's State Court action and its judgment against the bank and the bank's funds is binding upon the Government either under the doctrine of res judicata or collateral estoppel as to any issue involving the Government's estate tax claim either against the estate of Adriana Bosurgi, the Bosurgis themselves or the bank. We do contend that the doctrine of collateral estoppel precludes the Government or anyone else for that matter from attacking SAICI's State Court judgment insofar as it involves the bank and the settlement of SAICI's common law cause of action and that in any event,

the Government is estopped from doing so in the federal court after its attempts in the state court failed. The integrity of SAICI's State Court judgment may not be challenged, because to quote Montana, supra, one "who assists in the prosecution or defense of an action in aid of some interest of his own * * * is as much bound * * * as he would be if he had been a party to the record" (Montana, at p. 154).

THE BROAD DISCOVERY AVAILABLE TO AND AVAILED OF BY THE GOVERNMENT

The Government was furnished with the voluminous pretrial deposition of Richard Ginglen (482 pages), the Chemical Bank officer in charge of the Bosurgi account and all available

records and documents of the bank pertaining to any of the parties hereto, spanning a period of more than two decades. The Government conducted its own pretrial deposition of Mr. Ginglen (130 pages); also a pretrial examination of Benedict Ginsberg (71 pages). The Government was permitted to examine our office files and to make note of the documents supplied to us from abroad. (A 36-7)

On November 24, 1971 we gave the United States Attorney a photostat of a document attested by a notary public, with a translation certified by the American Vice Consul at Montevideo, Uruguay, which set forth that:

> "(a) Drs. Emilio and Leone Bosurgi and the deceased Mrs. Adriana Caneva Bosurgi were not founders of S.A.I.C.I. (Commercial and Industrial Investments Corporation);

(b) That they have not attended any meeting of the Society; and (c) That they have never occupied any office of director, nor they have discharged any executive office within the Society neither direct or through legal attorneys."

Shortly thereafter, at a conference with Leon Hart, United States Attorney at the Appellate Division of IRS, specific reference was made to the foregoing document and in response to his request we gave him two copies of SAICI's State Court summary judgment motion and the documents in support thereof. In return, since the Government had better investigatory facilities, we requested and it was agreed that we be furnished with whatever information was obtained bearing upon the authenticity of the documents supplied to us and upon which we relied. Our subsequent requests therefor were ignored and met with the

following claim asserted in an affidavit by Government counsel:

> "7. All work undertaken by Hart relating to SAICI's claim of ownership of that custodian account was in the course of his duties and responsibilities as Appellate Appeals Officer for the Internal Revenue Service in connection with those tax petitions filed in the United States Tax Court. The resulting information and materials, if any, are therefore privileged as attorney work product. See Rule 26(d)(3) of the Federal Rules of Civil Procedure." (A72)

The Government fails to indicate a single line of inquiry and any specific fact that it can or could produce through an examination of SAICI's officers if any were available that would conceivably have any bearing on the validity of SAICI's State Court judgment upon which SAICI solely relied. Moreover, as SAICI's counsel stated below:

> "We claim we have answered all the interrogatories that were within reason to answer. There is nobody alive as I understand it. It is an anonymous company. We have no opportunity to get in touch with any people..." (A96)

No trial or meaningful judicial hearing was accorded on the issues thus presented, notwithstanding that the order of preclusion theretofore granted by Magistrate Bernikow restricted SAICI to proving that the State Court litigation was, to employ the language of this Court in Durfee v. Duke, 375 U.S. 106, 111, "fully and fairly litigated" as between the bank and SAICI.

What was resorted to here by the Government, to quote United States v. Dibble, 429 F.2d 598, 601 (9th Cir. 1970) is "a clever procedural gambit" whereby SAICI was unconstitutionally deprived of a trial and hearing as to the integrity of its State Court judgment and subjected to an enormous penalty of $400,000 which it is earnestly submitted is a grave miscarriage of justice.

Indeed, the record warrants the summary direction by this Court that the trial of such issue be promptly had.

Respectfully submitted,

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Attorney for Petitioner